Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1749

JOSEPH WATERMAN,

Petitioner,

vs.

BERNARD CHUPKA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN L. FRANCIS
City Attorney

JAMES R. KIRK
Senior Assistant City Attorney
90 West Broad Street
Columbus, Ohio 43215

HAROLD E. WONNELL
140 East Town Street
Columbus, Ohio 43215

Attorneys for Respondents

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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GROUNDS FOR DENIAL OF WRIT OF CERTIORARI

The respondents pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit be denied and that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed for the following reasons:

I. The issues set forth in the petition for the writ of certiorari by the petitioner herein were not raised in the U. S. District Court for the Southern District of Ohio, Eastern Division, or in the United States Court of Appeals for the Sixth Circuit and are here urged for the first time.

II. The issues so urged were not present in the Franklin County, Ohio, Municipal Court, the Court of Appeals for the Tenth District of Ohio, the United States District Court for the Southern District of Ohio, Eastern Division, or the United States Court of Appeals for the Sixth Circuit.

III. The petition for a writ of certiorari erroneously interprets the decision of the Tenth District Court of Appeals of the State of Ohio insofar as it concludes that court decided the issue which was present in the instant civil rights case and that it finally decided the issue in the local Court on behalf of the petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The within brief is filed in accordance with Rule 24 of the Supreme Court Rules.

STATEMENT OF THE CASE

On August 22, 1973, after a three day jury trial in the Franklin County, Ohio, Municipal Court, the petitioner was found guilty by the jury of a violation of Columbus, Ohio, Municipal Ordinance, § 2355.02, for unlawfully obstructing members of the Columbus Police Department at the scene of an arrest. This conviction is based essentially upon the following facts.

On the night of December 2, 1972, there was a disturbance at the El Toro Lounge on South High Street in Columbus, Ohio, and one Officer Ruda of the Columbus Police Department caused an officer in trouble signal to be broadcast. (R. 393-397) Respondent, Officer Denver Wray, responding to that call was the first to arrive on the

scene. (R. 395) He immediately went into the El Toro Lounge and encountered Officer Ruda in a scuffle with one he recognized as Roscoe Dean, with whom he had previous contact. (R. 397) He knew Dean to be a mental case who was very physical after drinking. (R. 397) Wray assisted Ruda in arresting Roscoe Dean and escorted him to the rear of a police vehicle where he was placed inside. (R. 398) Dean was placed in the extreme left rear portion of the wagon next to the rear door. (R. 399)

There had gathered a large crowd of onlookers and upon orders of Sergeant McCormick, the immediate superior of Wray and several other officers who had arrived, Wray and others began an effort to clear the scene of the arrest of Dean and others. (R. 401) Officer Wray saw Officer Smith endeavoring to move the crowd away from the scene of the arrest and heard the petitioner, Waterman, say; "I'm an attorney and a United States citizen, and I don't have to move." (R. 403) In the ensuing encounter between Officer Wray and Waterman when the latter was asked to leave the immediate scene, Waterman told Officer Wray he would not move and that if he were arrested, it would be the sorriest day of Officer Wray's life. (R. 404) Arrests were still underway and Waterman was standing at the curb in a position so he could look inside the side door of the police vehicle which was parked at an angle to the curb headed in a southwest direction. (R. 158, 223, 227, 236, 403) When Waterman came on the scene, no one except Roscoe Dean had been arrested and placed in the wagon. (R. 153) While the officer in trouble signal had been terminated, there was still a disturbance and arrests were being made. (R. 30-31) Waterman was at the entrance to the side of the police vehicle with a female companion. (R. 27-28) When asked to move out of the way and back from the wagon, Waterman refused although

his female companion moved out of the immediate area. (R. 31-32) Waterman was arrested and charged with violating § 2355.02 of the Columbus City Code.

Following his conviction, the petitioner filed his appeal with the Court of Appeals for Franklin County, Ohio; that is the Tenth District of Ohio Court of Appeals. The decision in that case is reported at 41 Ohio App. 2d 98. (A printed copy of that opinion is annexed to petitioner's petition for writ of certiorari. Appendix, page 24.)

Subsequent to the decision of the Franklin County, Ohio, Court of Appeals, the petitioner brought the instant action in the U. S. District Court, which was heard by a jury on September 29, 30, and October 1 and 2, 1975, resulting in a verdict in favor of the respondent police officers.

Petitioner then on November 3, 1975, filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio. The sole questions presented by petitioner in that appeal were as follows:

1. Whether the trial court erred in denying plaintiff-appellant's motion for directed verdict on the ground of considering the evidence in its best light for defendants-respondents reasonable minds could not differ from the conclusion that defendants were liable to plaintiff.
2. Whether the trial court erred in denying plaintiff's motion for judgment notwithstanding the verdict on the basis that no evidence was introduced at trial that could support the verdict returned.

Following argument on February 4, 1977, the United States Court of Appeals for the Sixth Circuit by order filed February 15, 1977, affirmed, the actions of the United States District Court in submitting the case to the jury and found that no prejudicial error had occurred at the trial.

ARGUMENT

GROUND No. I

THE ISSUES SET FORTH IN THE PETITION FOR THE WRIT OF CERTIORARI BY THE PETITIONER HEREIN WERE NOT RAISED IN THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, OR IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND ARE HERE URGED FOR THE FIRST TIME.

It is elementary and well settled that the Supreme Court does not give consideration to issues not raised in the courts below. *Hormel* v. *Helvering*, 312 U.S. 552 at 556, 85 L.Ed. 1037 at 1041, 61 S.Ct. 719, and *Walters* v. *St. Louis*, 347 U.S. 231 at 233, 98 L.Ed. 660 at 664, 74 S.Ct. 505.

Petitioner urges as the second question presented by his petition that motions for summary judgment and directed verdicts in civil rights litigation may be effectively abolished by actions of the trial courts as taken in the instant case. It should be noted at the outset that at no time was a motion for summary judgment sought. The only matter with respect to a directed verdict is so brief that it is set forth here in its entirety from page 428 of the record in the U. S. District Court.

> MR. CONNOR: If it please the Court, we would move the Court to direct a verdict on the question of liability in our favor due to the fact that based upon the law as the Court has indicated it understands the law and will instruct the jury as such, it would appear that the Court can find, as a matter of law, even giving the Defendants — considering the Defendants' evi-

dence in its best light that there is no question that Joseph Waterman did not interfere at the scene of the arrest of Roscoe Dean or the other three people that were arrested on December 2, 1972.

In the brief of the petitioner filed in the United States Court of Appeals for the Sixth Circuit, the sole questions presented are as follows:

1. Whether the trial court erred in denying plaintiff-appellant's motion for directed verdict on the ground that considering the evidence in its best light for defendants-respondents reasonable minds could not differ from the conclusion that defendants were liable to plaintiff.
2. Whether trial court erred in denying plaintiff's motion for judgment notwithstanding the verdict on the basis that no evidence was introduced to trial that could support the verdict returned.

It is clear that at no time in the United States District Court for the Southern District of Ohio, Eastern Division, or in the United States Court of Appeals for the Sixth Circuit, did petitioner raise the issues he now urges in support of his petition for writ of certiorari.

GROUND No. II

THE ISSUES NOW URGED WERE NOT PRESENT IN THE FRANKLIN COUNTY MUNICIPAL COURT, THE COURT OF APPEALS FOR THE TENTH DISTRICT OF OHIO, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, OR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner urges explicitly and seeks to cite cases in support of his contention that since his conviction growing out of a violation of an ordinance of the City of Columbus, Ohio, was reversed by the Franklin County, Ohio, Court of Appeals, the doctrine of collateral estoppel operates to bar the United States District Court from submitting the question of good faith probable cause, on the part of respondents, to the jury impaneled to hear the facts in his civil rights case. While in certain fact patterns, the doctrine of collateral estoppel may apply, this proposition is clearly inapplicable in the instant case since the issues urged were not present in any of the preceding cases before the civil rights case and the parties and the facts were different.

The issue in the petitioner's criminal trial before the Franklin County Municipal Court was whether or not the petitioner had violated § 2355.02 of the Columbus City Codes.

The issues presented by the petitioner to the Franklin County, Ohio, Court of Appeals in no way encompass the issue of fact which was before the United States District Court jury. A brief reference to the assignments of error made by the petitioner to the Franklin County, Ohio,

Court of Appeals appearing from the bottom of page 99 through page 100 of that Court's decision reveals that the issue in the civil rights case was never presented to the Court of Appeals in Franklin County, Ohio, and for that reason to urge the doctrine of collateral estoppel is erroneous.

The record at page 429 and page 430 reveals that the petitioner conceded that an appropriate issue upon which the U. S. District Court should charge the jury was the issue of good faith probable cause, on the part of respondents. At that place in the record the U. S. District Court Trial Judge invited comment concerning objections, additions, alterations, or omissions to the charge. At that juncture in time, the petitioner did not raise the doctrine of collateral estoppel or in anyway urge it upon the Court. At no time was it inferred that the Franklin County, Ohio, Court of Appeals decision had a res judicata effect upon the civil rights case then to be decided by a jury in the U. S. District Court.

The issues presented to the United States Court of Appeals for the Sixth Circuit by the petitioner make it eminently clear that the petitioner did not *then* think that the Franklin County, Ohio, Court of Appeals decision worked in any way as a bar to the determination by a jury sitting in the U. S. District Court of the factual issue of good faith probable cause.

While the cases cited by the petitioner are in some respects supportive of the doctrine of collateral estoppel, they are not in point in the instant case. *Mastracchio* v. *Ricci,* 498 F.2d 1257 (1st Cir. 1974), is a case resulting in a summary judgment against the plaintiff wherein while a state criminal proceeding was not yet terminated, the plaintiff brought a civil rights action based upon alleged

perjured testimony of a police detective. At page 1259 of that decision the following language appears:

> . . . when Civil Rights action is brought in Federal Court which presents same issue which was decided in a prior state civil action that prior state judgment *may have* a collateral estoppel (or res judicata) effect upon the Federal suit.
>
> (Emphasis writers.)

At page 1260 there is the following language:

> . . . Collateral estoppel operates, *of course, only as to matters actually litigated and decided at the prior trial. . . .*
>
> (Emphasis writers.)

In substance, *Mastracchio* holds that prior state action *may have* a collateral estoppel effect but *only* as to matters actually litigated and decided at the prior trial. Such is not the case here and thus *Mastracchio* becomes more authoritative for the respondents than for the petitioner.

The same is true of the decision in *Rosenberg* v. *Martin,* 478 F.2d 520 (2d Cir. 1973), a case involving a judgment against a former police inspector in favor of a prisoner which was reversed on appeal with instructions to dismiss the complaint. It should be noted, that the identical issue, it was held, had been twice litigated against the plaintiff. The issue there was deprivation of a right to a fair trial because of publicity releases by a former police inspector. *Rosenberg* is distinguishable because it was held that the identical issue had been twice litigated. In the instant case the identical issue was never litigated until originally in the civil rights action in the United States District Court.

The case of *Pyles* v. *Keane,* 418 F.Supp. 269, (D.C. S.D., N.Y., 1976) stands only for the proposition that the doc-

trine of collateral estoppel can be raised and considered upon a pre-trial motion to dismiss. Therein a motion to dismiss a prisoner's action against police officers for declaratory judgment and money damages for alleged violations of civil rights was sustained. The suit was based upon denial of assistance of counsel, search and seizure, as well as malicious prosecution. The case is simply not in point.

In *Cromwell* v. *County of Sac,* 94 U.S. 351, 24 L.Ed. 195 (1876), it was held that the issue was not the same and estoppel did not lie in an action against an Iowa county upon interest coupons issued for the erection of a courthouse. That is no authority for the propositions which are urged by petitioner herein. For further authority that the issues must be the same, see *Preiser* v. *Rodriguez,* 411 U.S. 475, 36 L.Ed. 2d 439, 93 S.Ct. 1827 (1973), where the question presented to the Court was whether the action was in habeas corpus requiring exhaustion of state's remedies or Civil Rights and petitioning prisoners sought to persuade the Court to follow cases regarding prison conditions rather than early or speedier release. The Court refused to embrace a collateral estoppel since the issues were not the same.

Even if the doctrine of collateral estoppel had been raised before the U. S. District Court, such an objection would have been properly overruled. It is respectfully submitted that since the issues now urged were not present, the trial court properly charged the jury and in so doing followed the law of the State of Ohio as enunciated in the very case which petitioner urged upon the Court; to wit, *City of Columbus* v. *Waterman,* 41 Ohio App. 2d 98.

GROUND No. III

Petitioner at page 18 of the Petition for Certiorari filed herein alleges that the factual evidence in the instant case was identical to the state criminal case. Respondent respectfully submits that this is not true. This may be a minor point of contention; however, in any event, the Court is in no position to determine whether the allegation made on page 18 is true or false inasmuch as the record of the state criminal proceeding is not before this Court.

Further, at page 18, petitioner states that under state law the case was reversed and final judgment entered for the petitioner. At no place in the opinion of the Franklin County, Ohio, Court of Appeals in *Columbus* v. *Waterman,* 41 Ohio App. 2d 98, is there any language entering final judgment for the petitioner. As a matter of fact, at page 105 of that opinion, the Court sustained the fifth assignment of error of the petitioner on the ground that his motion for a new trial should have been sustained. The granting of a new trial in no way is a final judgment for the petitioner. In the concurring opinion of J. Strausbaugh in sustaining assignments of error raised by the petitioner, at page 106, that eminent jurist indicates ". . . *I would reverse and remand this matter for re-trial. . . .*" Certainly no one can successfully contend that language supports the conclusion that a final judgment was rendered on behalf of the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied for the reasons that the issues now raised by petitioner were not timely raised, either in the U. S. District Court or in the U. S. Court of Appeals for the Sixth Circuit and properly so because the issues now urged were not present in the Franklin County, Ohio, Municipal Court, the Court of Appeals for the Tenth District of Ohio, the United States District Court for the Southern District of Ohio, Eastern Division, or the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOHN L. FRANCIS
City Attorney

JAMES R. KIRK
Senior Assistant City Attorney
90 West Broad Street
Columbus, Ohio 43215

HAROLD E. WONNELL
140 East Town Street
Columbus, Ohio 43215

Attorneys for Respondents